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In the

Supreme Court of the United States

OCTOBER TERM, 1963

No. 586

H. W. HANSELL, MARK C. DAMRON and GLADYS I. DAMRON, JOHN E. DYBALL, HENRY M. WARREN, JR., and MARION WARREN, and JAMES KEMPTON,
Appellants

and

HARVEY ALUMINUM (INCORPORATED),
Intervenor-Appellant

vs.

G. A. DOUGLASS, ALEX MARSHALL, REX KASEBERG, WILLIAM D. KETCHUM, KENNETH SNODGRASS, KENNETH WEBB, P. EVERETT CURTISS, and T. F. BRUMBAUGH, acting as the District Boundary Board for Wasco County, Oregon; SCHOOL DISTRICT NO. 9, Wasco County, Oregon (Chenowith), and DON CALDER, OLLIE LASH, ROBERT WOOLSEY, NAT JONES and SAM TRAMONTINA, acting as its directors; SCHOOL DISTRICT NO. 52, Wasco County, Oregon (Mosier), and WM. LEININGER, MARVIN HUDSON, JOHN HUSKEY, CLAUDE BERTHOLD and HOWARD ROOT, acting as its directors; SCHOOL DISTRICT NO. 86, Wasco County, Oregon (Rowena), and WM. GARDNER, LEONARD DALBEC, DALE BROTT, MILLIE BRACE and CHAS. BELLERIVE, acting as its directors,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

MOTION TO DISMISS

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Rules of The United States Supreme Court
Rule 16 1

Motion to Dismiss

Pursuant to Rule 16 of the Rules of the United States Supreme Court, appellees respectfully request that this Court enter an order dismissing the appeal on the grounds or any one of them it does not comply with 28 U.S.C., Sec. 1257(2), the judgment below rests on an adequate non-federal basis, the question to be reviewed was not timely raised or expressly passed upon and the question raised does not present a substantial federal question.

STATEMENT OF THE CASE

Prior to October 12, 1961 students attending high school grades and resident within School Districts Nos. 9, 52 and 86, Wasco County, Oregon had been attending a high school maintained by School District No. 12. On October 12, 1961, School District No. 12 notified the governing boards of the three districts that no more high school students would be accepted. It was imperative that high school facilities be made available for the high school students of the three districts. A consolidation of the three districts was proposed in order that a high school might be constructed.

Pursuant to a constitutional grant of power (Article VIII, Sec. 3, Oregon Constitution) the legislature of Oregon enacted certain school consolidation election procedure statutes (ORS 330.110 et seq). Under this

constitutional and statutory authority petitions were circulated in the three rural school districts seeking the consolidation of the separate districts into one large district.

A few individuals, appellants herein, and the intervenor, Harvey Aluminum (Incorporated), the largest owner of taxable property in the proposed district, approximately 70% thereof, contested the validity of the consolidation election.

In one district the petition carriers failed to verify the petitions circulated by them. Appellants contend that although the school consolidation statute (ORS 331.110) was silent as to verification, the school districts were governed by a general enactment (ORS Chapter 254) prescribing such a requirement for districts exercising the initiative and referendum powers granted by Article IV, Sec. 1a of the Oregon Constitution.

The Oregon Supreme Court held that Article IV did not apply to school districts and that the legislature, per Article VIII, had prescribed the applicable election procedures for school districts. The unverified petitions contained the signatures of more than 200 legal voters of the district, the statute requiring only 100 such signatures. The trial court found that the appellants had failed to sustain the burden of proving the inadequacy of the petitions.

In each of the three school districts the affirmative vote for consolidation was two votes for each one for the negative. There was no allegation or evidence of fraud in the conduct of the election or tampering with the ballot boxes. No voter had been denied the right to vote and all votes cast were counted. The trial court and the Oregon Supreme Court found that the claim of the appellants that the election procedure was "replete with errors and omissions in flagrant violation of the requirements of the initiative laws of the State of Oregon" was not sustained by the evidence.

The appellants, in their jurisdictional statement of the case, page 4, continue to assert "the notices for election were published by unauthorized agencies * * *" notwithstanding the opinion of the trial court (Memorandum Opinion Juris. St. p 27) that the appellants inadvertently have misread the statutory requirements of ORS 330.110(2).

There was no evidence that any alleged ministerial irregularities would have changed the results of the election. (Memorandum Opinion Juris. St. p. 29 and Oregon Supreme Court Opinion, Juris. St. p 16.)

ARGUMENT

This Appeal Cannot Be Sustained Under 28 U.S.C. Sec. 1257(2)

Appellants rest their appeal on 28 U.S.C. Sec. 1257-

(2). This section requires that a statute repugnant to the Constitution of the United States be drawn into question in a state court and be upheld by the highest court in the state. In the lower court and on appeal appellants relied on Article IV, Sec. 1a of the Oregon Constitution and Chapter 254, Oregon Revised Statutes to support their claim that voters in school districts have the power of initiative and therefore the consolidation election in this case should have been conducted according to laws governing initiative elections. (ORS 254 et seq) (Juris. St p 4)

The Supreme Court held neither the constitutional provision relied upon nor the statutes urged thereunder applied.

Appellees urged that Article VIII Sec. 3 of the Constitution, giving the legislature the responsibility of establishing a common school system and ORS 330.110 et seq setting forth procedures to be followed in a school consolidation election, were controlling.

On appeal, appellants did not challenge the validity of the above constitutional provision and statutes. At page 5 of their reply brief in the Oregon Supreme Court, they state:

> "The initiative statutes, ORS Chapter 254 and Article IV, Sec. 1a, do not conflict with Article VIII, Sec 3, and ORS 330.110."

Neither of these constitutional provisions nor the statutes promulgated thereunder were attacked in the trial or Supreme Courts of Oregon as being repugnant to the Federal Constitution. As a matter of interpretation the Oregon Supreme Court held initiative election procedures (ORS 254 et seq) did not apply—that consolidation election procedures (ORS 330.110 et seq) did.

It is appellees' position such a conclusion does not put the Oregon Supreme Court in the position of upholding a statute which has been challenged as being repugnant to the United States Constitution. Thus it is submitted at the outset, appellants do not have the necessary grounds upon which to base their appeal under 28 U.S.C. Sec. 1257(2). *Slagle v. Ohio*, 366 US 259, 264 (1961); *Raley v. Ohio*, 360 US 423, 434, 435 (1959); *Anonymous v. Baker*, 360 US 287, 290 (1959); *Rohr Aircraft Corp v. County of San Diego*, 362 US 628, 629, 630 (1960).

The Judgment Below Rests On An Adequate Non-Federal Ground

One of the issues before the Supreme Court was whether Article IV, Sec. 1a of the Oregon Constitution granted school districts the initiative power. It is essential to note the Oregon Court has always construed Article XI, Sec. 2, and Article IV, Sec. 1a together. *Rose v. Portland*, 82 Or 541, 548, 162 Pac 498 (1917). These amendments passed in 1906 are commonly re-

ferred to as the "home rule" amendments. Originally it was claimed these amendments gave all municipalities the power to legislate for themselves. *Branch v. Albee*, 71 Or 188, 142 Pac 598 (1914). It was later made clear in *Rose v. Portland*, supra, the initiative power contained in Article IV, Sec. 1a, only applied to cities and towns to the exclusion of all other "municipalities" unless the power was granted by the legislature.

As pointed out in the Oregon Supreme Court's opinion (pp 14 and 15, Juris. St) prior decisions establish that school districts do not come within the constitutional grant of Articles XI, Sec. 2 and IV, Sec. 1a. *School District No. 35 v. Holden*, 78 Or 267, 151 Pac 702 (1915); *School District No. 17 v. Powell*, 203 Or 168, 186, 279 P2d 492 (1955); also see *Carriker v. Lake County*, 89 Or 244, 171 Pac 408 (1918).

Since no federal question was raised or decided by the Oregon Supreme Court, appellees believe the decision below rests squarely on a non-federal basis and as such is not reviewable by this court. *Stembridge v. Georgia*, 343 US 541, 547 (1952); *Ellis v. Dixon*, 349 US 458, 459, 464 (1955); *Williams v. Keyes*, 186 So. 250, 268, 135 Fla 769 (1939). Appellees further contend inasmuch as this case involves interpretation of certain provisions of the Oregon Constitution and the construction of statutes thereunder, questions of local law are

involved, and this Court need not take jurisdiction. *Kiernan v. Portland*, 223 US 151, 163, 164 (1911); *Ohio v. Hildebrant*, 241 US 565, 568 (1915); *Des Moines National Bank v. Fairweather*, 263 US 103, 105 (1923); *Louisville Gas and Electric Co. v. Coleman*, 277 US 32, 36 (1927).

The Federal Question To Be Reviewed Was Not Timely Raised or Passed Upon

Appellants state the federal question sought to be reviewed was first raised in their amended complaint (Juris. St p 5). It is submitted that the phrases "this court should declare the constitutionality of said statutes" and "(2) declaring the validity or invalidity of said school district consolidation proceedings and the constitutionality thereof" appearing in the body and prayer of the amended complaint respectively were insufficient to appraise the court that a violation of Amendment XIV, Sec. 1 of the United States Constitution and Article I, Sec. 20 of the Oregon Constitution was an issue in the case. (Appellants' Ab. of Record and Brief, pp 12, 13).

The transcript of proceedings in the trial court is void of any assertion of a constitutional question. A diligent search of appellants' brief and reply brief in the Oregon Supreme Court fails to disclose any mention of unconstitutionality with respect to the Oregon or United States Constitutions.

A federal question was first presented to the Oregon Supreme Court on May 14, 1963 in appellants' petition for rehearing. The petition was denied May 21, 1963 without opinion.

The decisions of this Court clearly enunciate the policy that the Supreme Court of the United States will not review the judgment of the highest court of a state on a federal question when the question was first raised on petition for rehearing and the petition was denied without opinion. *Hanson v. Denckla*, 357 US 235, 244 (1958); *Wall v. Chesapeake and Ohio Railway Co.*, 256 US 125, 126 (1920); *Citizens National Bank of Cincinnati v. Durr*, 257 US 99 (1921); *Radio Station WOW, Inc. v. Johnson*, 326 US 120, 128 (1945).

This Court further has held that where it is the policy of a state's highest court not to consider a federal question not assigned or relied upon in the briefs or argument of counsel, no basis for review exists. *Hurlburt v. City of Chicago*, 202 US 275, 281 (1905). The Oregon Supreme Court has stated it will not consider an assignment of error involving a constitutional question raised for the first time in the Supreme Court unless the record in the trial court affords some basis for finding that a challenged act invades a constitutional right. *Allen v. City of Portland*, 35 Or 420, 451 (1899); *Highway Commission v. Helliwell*, 225 Or 588, 591, 358 P2d 719 (1961); *Senger v. Vancouver-Portland Bus Co.*,

209 Or 37, 43, 298 P2d 835, 304 P2d 448 (1956). The court has also held a point raised for the first time in a petition for rehearing is not timely. *Rohner v. Neville*, 230 Or 31, 44, 45, 368 P2d 391 (1962).

Appellants' contention that the Federal and Oregon Constitutions were violated was not timely raised or passed upon and decisions of this Court and the Oregon Supreme Court warrant dismissal of the appeal on this ground.

This Appeal Does Not Present A Substantial Federal Question

In their petition for a rehearing appellants for the first time argued that ORS 331.130 granted to school districts of 100,000 or more population the initiative power, and that this grant constituted an irreconcilable conflict with the court's decision that Article IV, Sec. 1a, standing alone, does not give a school district the power to enact its own laws.

Appellees suggest that the decision creates no conflict whatsoever. As pointed out in the opinion:

> "* * * the two amendments (Article IV, Sec. 1a-Article XI, Sec. 2) extended the initiative power only to those municipalities that had the power to legislate; basically cities and towns. * * * 'No other corporate body can, without an enabling act, legislate power unto itself to legislate.' " (Supreme Court Opinion, Juris. St. p 14) (parenthesis added).

The Court further pointed out the two amendments do not prevent the legislature from enacting general legislation governing all municipalities and districts which would include a school district. (Supreme Court Opinion Juris. St. p 15).

Appellees submit school districts of 100,000 or more population have been given the power of initiative, referendum and recall in ORS 331.130 under authority found in Article VIII, Sec. 3, of the Oregon Constitution. The statute (ORS 331.130) makes no reference to Chapter 254 ORS, or procedures outlined therein to conduct an initiative election, but specifically states elections will be conducted in compliance with ORS 331.010 to ORS 331.180. In other words the application of these powers has been limited by the legislature. It is evident from the foregoing a school district having a population of 100,000 or more is not governed by the initiative statutes of the State of Oregon but is governed by election procedures similar to those employed in all school elections.

Even if it were construed ORS 331.130 requires school districts of 100,000 or more population holding an initiative election to conduct same in accordance with Chapter ORS 254 et seq rather than ORS 331.010-331.180, there is no automatic denial of due process or equal protection to voters in smaller districts since the legislature may make reasonable classifications. *Mc-*

Gowan v. Maryland, 366 US 420, 425, 426 (1961); *Mason v. Missouri ex rel McCaffery*, 179 US 328, 335 (1900); *Schmidt v. City of Cornelius*, 211 Or 505, 512, 316 P2d 511 (1957).

Neither *Gomillion v. Lightfoot*, 364 US 342 (1960) nor *Baker v. Carr*, 369 US 186 (1962) cited by appellants are relevant to the facts in this case. (Juris. St. pp 2, 8)

In *Gomillion*, supra, the court was concerned with redistricting which resulted in the loss by negro voters of their right to vote. *Baker*, supra, dealt with unequal apportionment resulting in a dilution of voting power.

In the instant case there is no deprivation of voting rights. We are concerned only with election procedures. A cursory examination of Oregon's school election laws (ORS 330 et seq-ORS 331 et seq) will show adequate control and regulation of elections, contrary to appellants' statement:

> "* * * all other school district elections in the State of Oregon will be subject to a complete lack of control and regulation." (Juris. St. p 9).

CONCLUSION

The Oregon Supreme Court determined that the constitutional home rule amendments do not apply to

school districts in that these districts lack the power to legislate, except as the legislature, pursuant to Article VIII, Sec. 3 of the Oregon Constitution, may enact enabling legislation granting this power.

The Oregon legislature under the constitutional authority of Article VIII, Sec. 3 has established a common school system in this state. It has enacted legislation establishing consolidation election procedures. It has not required such procedures to conform to election procedures established for political subdivisions having initiative and referendum (i.e. legislative) powers.

This appeal involves the interpretation of two provisions of the Oregon Constitution. The Supreme Court of Oregon has applied these provisions to school district consolidation elections by declaring that Article IV, Sec. 1a does not apply and the legislature, pursuant to Article VIII, Sec. 3, may prescribe consolidation election procedures. This matter is wholly local unto the State of Oregon and its constitution and statutes.

It is submitted the lower court's decision is based upon an adequate non-federal basis, that the federal question now before this court was not timely presented to or passed upon by the Oregon Supreme Court, and is not substantial as to merit this court's attention.

For the foregoing reasons this appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

STATE STATUTES AND CONSTITUTION

Oregon Revised Statutes

ORS 254.040 (Juris. St. pp 32, 33)

ORS 254.340

"(1) Any municipality or district in exercising the powers of the initiative and referendum granted by sections 1 and 1a, Article IV, Oregon Constitution, shall follow the procedure in ORS 221.210, 221.310, 250.230, 254.030 to 254.100, 254.110 to 254.170, 254.320, 254.330, and 255.410 to 255.450 * * *"

ORS 330.110 (Juris. St. pp 33, 34)

ORS 331.130 (Juris. St. pp 34, 35)

Oregon Constitution

Article I, Sec. 20 (Juris. St. p 31)

Article IV, Sec. 1a (Juris. St. pp 31, 32)

Article VIII, Sec. 3

"The Legislative Assembly shall provide by law for the establishment of a uniform and general system of common schools."

Article XI, Sec. 2

"Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon, * * *"